Attachment to UIPL 24-77

U.S. DEPARTMENT OF LABOR

OFFICE OF THE SECRETARY

WASHINGTON

In the Matter of:

THE QUESTION OF WHETHER THE
STATE OF OREGON'S EMPLOYMENT
DIVISION LAW CONFORMS WITH THE
REQUIREMENTS OF THE FEDERAL
UNEMPLOYMENT TAX ACT

H.A. Kelley, Esquire
Thomas Earl Mullins, Esquire
Room N-2101
New Department of Labor Bldg.
200 Constitution Ave., N.W.
Washington, D. C. 20210

For the U.S. Department of Labor

E. Nordyke, Esquire
Employment Division
State of Oregon
110 State Office Building
Salem, Oregon

For the State of Oregon

Herbert C. Hardy, Esquire
Hardy, Butler, McEwen, Weiss & Newman
1408 Standard Plaza
Portland, Oregon

For the Intervenor,

Oregon Food Processors

Before: FRANCIS E. DOWD
Administrative Law Judge

DECISION OF THE SECRETARY

Statement of the Case

Pursuant to a "Notice of Hearing" issued by the Secretary of Labor on April 20, 1976, the captioned matter was referred to Administrative Law Judge Francis E. Dowd for the purpose of conducting a hearing and issuing a recommended decision on the question of whether or not the State of Oregon's employment division law conforms with the requirements of the Federal Unemployment Tax Act.

Hearing was held on June 24, 1976 in Washington, D.C. All parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence bearing upon the issues involved herein.

Upon the basis of the entire record, the Administrative Law Judge issued a "Proposed Recommended Decision" on August 24, 1976. No exceptions to that decision were filed. The Administrative Law Judge made final Findings of Facts and Conclusions of Law and Recommendations in his "Recommended Decision" dated September 17, 1976.
This matter is now before me for consideration and review of the Administrative Law Judge's "Recommended Decision". I have reviewed the entire record in this case certified to me by the Administrative Law Judge and I adopt the Administrative Law Judge's "Recommended Decision" to the extent that it is consistent with the following.

Discussion

The Administrative Law Judge's Findings of Fact and Conclusions of Law numbers 10–15 are struck and the following new Findings of Fact and Conclusions of Law are substituted therefor.

"10. The special noncharging provision for food processors under Oregon law (sec. 657.511 of the Oregon Employment Division Law) is violative of section 3303(a)(1) of the Federal Unemployment Tax Act. The assertion of Oregon that the provision is acceptable is unsupported by factual or legal analysis.

a. The general principle underlying the Department's interpretations of section 3303(a)(1) has been that a State must charge all employers by the same rule over the same period of time.

b. By singling out food processors for special treatment, the Oregon provision is inconsistent with the aforementioned principle underlying section 3303(a)(1). Further, the Oregon law whether measured by the figures of Oregon or of the Department has an adverse impact on other employers in Oregon that is more than de minimus.

11. Oregon asserts that under the language of section 3303(a)(1), noncharging may be allowed based upon factors bearing a direct relationship to unemployment risk which are not necessarily related to the individual employer's risk of unemployment. It asserts that such factors are related

to the risk of unemployment in its much broader concept or generic sense. Oregon argues that among the criteria previously used by the Department in approving plans is a consideration of whether the particular noncharging provision would have any substantial effect upon the ability of a State to pay benefits to its unemployed workers over a reasonable period of time.

While the Department of Labor has recognized solvency of the program as a factor relating to the conformity of a noncharging provision with Federal law, solvency under a proposed noncharging provision is not in itself a reason to find the noncharging provision in conformity with the Federal requirements. Oregon fails to establish that its food processor provision is consistent with other standards utilized by the Department of Labor in approving noncharging provisions under section 3303(a)(1). The test for acceptability of noncharging provisions consistently used by the Department to assure that all employers are charged by the same rule over the same period of time is one of reasonableness in the measurement of each employer's experience in relation to other employers and to the purposes of experience rating. (See Joint Exhibit 29, UIPL #78, December 29, 1944 and Joint Exhibit 41, UIPL #936, November 15, 1967). I find that the Oregon law in singling out food processors for special treatment is violative of this aforementioned principle of reasonableness in the measurement of each employer's experience in relation to other employers and to the purposes of experience rating.

12. I find that the economic reasons advanced in this case for enactment of the Oregon law granting special treatment to the food processing industry in Oregon is not a basis for approving a provision which is not in conformity with the Federal law."

Conclusion

I adopt the Administrative Law Judge's "Recommended Decision" to the extent that it is consistent with the foregoing.

I find that section 657.511 of the Oregon Employment Division Law does not conform with the requirements of section 3303(a)(1) of the Federal Unemployment Tax Act, and consequently the Oregon Employment Division Law is not in conformity with the Federal Unemployment Tax Act.

Dated: OCT 26 1976
Washington, D. C.
Secretary of Labor

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

Suite 700-1111 20th Street, N.W.

Washington, D.C. 20036

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Before: FRANCIS E. DOWD
Administrative Law Judge

RECOMMENDED DECISION

Introduction

This proceeding arises under section 3303 (b) of the Federal Unemployment Tax Act, 26 U.S.C. 3303 (b), a part of the Internal Revenue Code of 1954. Paragraphs (1) and (3) of section

3303 (b) contain the provisions applicable to this matter, which provide that:

(1) On October 31 of each calendar year, the Secretary of Labor shall certify to the Secretary [of the Treasury] the law of each State (certified by the Secretary of Labor as provided in section 3304 for the 12-month period ending on such October 31 (10-month period in the case of October 31, 1972)), with respect to which he finds that reduced rates of contributions were allowable with respect to such 12- or 10-month period, as the case may be, only in accordance with the provisions of subsection (a)

* * * * *

(3) The Secretary of Labor shall, within 30 days after any State law is submitted to him for such purpose, certify to the State agency his findings with respect to reduced rates of contributions to a type of fund or account, as defined in subsection (c), which are allowable under such State law only in accordance with the provisions of subsection (a). After making such findings, the Secretary of Labor shall not withhold his certification to the Secretary [of the Treasury] of such State law, or of the provisions thereof with respect to which such findings were made, for any 12-month period ending on October 31 (10-month period in the case of October 31, 1972) pursuant to paragraph (1) or (2) unless, hearing to the State agency, the Secretary of Labor finds the State law no longer contains the provisions specified in subsection (a) or the State has, with respect to such 12- or 10-month period, as the case may be, failed to comply substantially with any such provision.

The purpose of this proceeding is to obtain a finding by the Secretary of Labor of the United States, in accordance with the second sentence of section 3303 (b)(3), on whether the State of Oregon has amended the Oregon Employment Division Law so that it no longer meets the conditions required by subsection (a) of section 3303 of the Federal Unemployment Tax Act. Stated differently, the issue in this case is whether the State of Oregon's Employment Division Law, as amended by Chapter 810, Oregon Laws 1973, conforms with the requirements of section 3303(a)(1) of the Federal Unemployment Tax Act. More specifically, the question is whether the noncharging permitted by the amended Oregon statute violates the principle that all benefits paid must be charged in accordance with the same rule applicable to all employers and to all benefits paid. As correctly pointed out in the Department of Labor's brief, the issue is one of "conformity" and not one of "substantial compliance."

Action in this case was initiated by a Notice of Hearing sent to the Division of Employment of the State of Oregon Department of Human Resources, by letter dated April 20, 1976. The Notice of Hearing was published in the Federal Register at 41 FR 17037, April 23, 1976; amended 41 FR 22655, June 4, 1976. Pursuant to this Notice, as amended, a hearing was held at Washington, D.C., on June 24, 1976. The hearing was conducted by the undersigned Administrative Law Judge who was designated by the Chief Administrative Law Judge to hear the case and render a recommended decision to the Secretary. Following the hearing, the Intervenor filed a brief and the parties filed proposed findings of fact and conclusions of law, together with supporting briefs.

Based upon the entire record, I make the following findings of fact and conclusions of law

and recommend their adoption by the Secretary of Labor.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Section 3303(a)(1) of the Federal Unemployment Tax Act, 26 U.S.C. 3303(a)(1), contains the experience rating requirements for the unemployment compensation laws of States participating in the Federal-State Unemployment Compensation Program.

2. The Federal-State Unemployment Compensation Program is governed on the federal side by two interrelated statutes: the Federal Unemployment Tax Act (26 U.S.C. 3301–3311) and title III of the Social Social Security Act (42 U.S.C. 501-504).

3. The Federal Unemployment Tax Act (hereinafter Referred to as FUTA) establishes a system to encourage the enactment of unemployment compensation laws in the States. It does this through the imposition on every covered employer of a payroll tax which must be paid in full to the Federal Government unless the State has established by law an unemployment compensation law which is approved by the Secretary of Labor as being consistent with the requirements set out for such State laws in section 3304(a), FUTA. If a State does enact an acceptable unemployment compensation law, the contributions paid by an employer into the unemployment fund established under the State law may be used as a credit against a portion of the FUTA payroll tax which otherwise would be due to the Federal Government. The maximum credit available is 90 percent of the FUTA payroll tax.

4. The credit allowable to employers under section 3302(a), FUTA, with respect to contributions actually paid into a State unemployment fund, is commonly referred to as the normal credit against the federal unemployment tax. An additional credit is allowed under section 3302(a), FUTA, to employers who have paid contributions into a State unemployment fund at a reduced rate of taxation because their "experience" has been favorable. Thus, the maximum credit allowable to an employer under section 3302 is 2.7 percent (see sections 3302(c)(1) and 3302 (d)(1)), whereas an employer's actual rate of contributions may be less than 2.7 percent and as low as zero, with the application of theadditional credit allowance.

5. For an employer to qualify for an additional credit against the federal unemployment tax, the employer must be awarded a reduced rate of contributions in accordance with provisions in a State law that are certified by the Secretary of Labor as conforming with the "experience rating" requirements in section 3303(a), FUTA. Section 3303(b) (1) directs the Secretary of Labor to certify each State law on October 31, with respect to which he finds that reduced rates of contributions were allowable to employers in the year ending on that date "only in accordance with the provisions of subsection (a)" of section 3303.

6. The experience rating requirements in section 3303(a) that are applicable to Oregon's law are in paragraph (1). Section 3303(a)(1) reads as follows:

SEC. 3303. CONDITIONS OF ADDITIONAL CREDIT

ALLOWANCE.

(a) State standards. A taxpayer shall be allowed an additional credit under section 3302(b) with respect to any reduced rate of contributions permitted by a State law, only if the Secretary of Labor finds that under such law—

(1) no reduced rate of contributions to a pooled fund or to a partially pooled account is permitted to a person (or group of persons) having individuals in his (or their) employ except on the basis of his (or their) experience with respect to unemployment or other factors bearing a direct relation to unemployment risk during not less than the 3 consecutive years immediately preceding the computation date.

The requirement at the core of the issue in this matter is in the words "his * * * experience," which compels a conforming State experience rating system to measure each individual employer's experience.

7. The experience rating system established by the Oregon Employment Division Law is subject to the requirements of section 3303(a)(1) of the Federal Unemployment Tax Act, as a condition of the certification of the State law pursuant to section 3303(b) of the Act.

8. Oregon's experience rating system adopts benefits paid as the factor used to measure the experience of employers with unemployment risk, and adopts the proportional method of charging base period employers. Both the factor adopted and the proportional charging method are consistent with the requirements of section 3303(a)(1) of the Act.

9. In 1973 the Oregon legislature passed amendments to the Oregon Employment Division law which provided for noncharging specified unemployment benefit payments for certain food processing employers, and which imposed an additional tax on all other employers subject to the Oregon law for the purpose of replenishing Oregon's unemployment fund for the cost of the noncharge benefits. The noncharging amendment took effect on July 1, 1974, and first affected the contribution rates of Oregon employers in the tax year beginning on January 1, 1976.

10. The special noncharging provision for food processing employers is violative of the principle underlying the factor and the proportional charging method adopted in Oregon's experience rating system.

a. Section 3303(a)(1) of the Act requires that a State experience rating system based on benefit charge-backs must charge all employers by the same rule over the same period of time. This principle has been long established and is reaffirmed. The interpretation of the Department of Labor and its predecessors is entitled to great weight for the reasons stated in the Department's brief, and supported by legal precedent.

b. The special noncharging provision for food processing employers is inconsistent with section 3303 (a)(1) of the Act because it violates the aforementioned principle requiring the charging of all employers by the same rule of charging over the same period of time.

c. Notwithstanding the variety of reasons advanced by, the State of Oregon as to why it desired to pass a law granting a special favor to one industry in the State, the fact remains that the administrator of a federal program, is under a Congressional mandate to see that the Federal law is uniformly administered and applied in all 50 States. The obvious danger in making an exception today for Oregon food processors is that other States may seek tomorrow to make exceptions for "unique" industries in their States. As exceptions to a long established and time-tested rule proliferate, the underlying purpose of the rule will be effectively negated.

11. The contention of the Oregon agency that thirteen States have provisions in their unemployment compensation laws similar to the special noncharging provision for food processors is unsupported by fact or law.

12. The Oregon agency's contention that the special noncharging provision for food processors accords with the purposes of experience rating is unsupported by factual or legal analysis.

13. The Oregon agency's further contention that the noncharging is reasonable and therefore is consistent with section 3303(a)(1) is unsupported by any precedent or reasonable legal rationale.

14. The "de minimus" argument advanced by the Oregon agency has no legal merit, and is expressly rejected as an argument appropriate for consideration of an issue of conformity with the requirements of the federal law.

15. The contentions of the Oregon agency, as a set out in Paragraphs 11 through 14, have no bearing upon the main issue as defined in the Notice of Hearing issued in this matter, and are therefore irrelevant and unsupported by law.

RECOMMENDATION

I recommend that the Secretary adopt the Findings of Fact and Conclusions of Law set forth above and find that the State of Oregon has amended the Oregon Employment Division Law so that it no longer meets the conditions required by subsection (a) of section 3303 of the Federal Unemployment Tax Act.

FRANCIS E. DOWD
Administrative Law Judge
Dated: September 17, 1976
Washington, D. C.